(9) (8)

Nos. 87-826 and 87-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEROME F. GOLDBERG and ROBERT MCTIGUE,
Appellants,
v.
ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, *et al.*,
Appellees.

GTE SPRINT COMMUNICATIONS CORPORATION,
Appellant,
v.
ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE,
and JEROME COSENTINO, TREASURER OF THE STATE OF ILLINOIS,
Appellees.

On Appeal from the Supreme Court of Illinois

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the Commerce Clause precludes Illinois from imposing an excise tax on the retail purchase of interstate telephone calls involving an Illinois party and charged to an Illinois customer, when the same tax is levied on the purchase of intrastate calls and full credit is allowed for a similar tax paid to other States.

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INTEREST OF THE *AMICI CURIAE*

The *amici,* organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Appellants are attempting to invalidate an Illinois tax as it applies to retail interstate telecommunications services. The tax, which is also imposed on all intrastate calls, is levied on calls initiated or received in Illinois and charged to an Illinois service address. The tax provides a credit to avoid multiple taxation.

Amici are concerned about this case not only because of its importance to Illinois,[1] and to the other States that have a similar tax,[2] but also because the course advocated by appellants would substantially impair the States' ability to tax electronic communications and would lead the Court—and the States—back into the quagmire that its recent unanimous decision in *D.H. Holmes Co. v. McNamara,* 108 S.Ct. 1619 (1988), left behind.

In today's marketplace, almost all businesses are in some sense engaged in interstate commerce. Naturally,

[1] As of July 27, 1987, the amount of this tax paid to Illinois was at least $142 million, and the tax was being collected at a rate of $10 million a month, or about $120 million annually. See Brief for Appellants Goldberg and McTigue at 5.

[2] Appellants have identified ten States that impose taxes of some type on interstate telephone calls purchased in the State. See Brief for Appellant GTE Sprint App. A.

most businesses would like to use that connection to shelter their activities from state taxation by claiming that a tax violates the Commerce Clause. The States, however, are facing increasing responsibilities because of federal budget constraints and the current trend in both the Executive and Legislative Branches of the federal government to relinquish to the States responsibilities that had been borne by the federal government. The elected officials of each State need the freedom to acquire the revenue to meet these responsibilities from all the available sources.

The States are especially concerned that they not be deprived of the power to tax the new products and activities that the telecommunications, computer, and information industries are developing. These new activities sometimes involve the interstate "movement" of electronic impulses over huge distances at the speed of light under remote control, in sharp contrast to the conventional "movement" of cargo, passengers, and vehicles. They are a potentially important source of future state revenues which should not be foreclosed unless there is a clear constitutional necessity for doing so.

Illinois has selected a rational, uncomplicated, and practical taxing approach that requires purchasers of interstate telecommunications services to bear their fair share of the costs of government services. It is based on the charges to Illinois customers for calls involving Illinois parties. To avoid duplicate taxation, it provides a credit for other States' taxes.

Amici believe that, if appellants were to prevail here, the result would be either to exempt the purchase of interstate telephone conversations from state taxation altogether or to impose on all state legislatures constraints so complex, burdensome, and costly for customers, vendors, and States alike, that States would be effectively precluded from utilizing such taxes. The suggestion that the only valid way to tax such conversations is for each State through which a call "passes" to have a toll gate at its boundaries, and assess a tax corresponding to its particular contribution to the transmission of that particular call, ignores the reality of how a modern long distance telephone conversation is bought and transmitted.

Neither Congress nor the Court has mandated a single system of taxation to be used by all States. Instead, the Court has developed the four-part test set out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and applied in the Court's unanimous decision this Term in *Holmes*. The test recognizes that, in our federal system, each State can make different taxing choices based on widely varying political and economic conditions.

Amici believe that the decision of the Illinois Supreme Court upholding the tax is correct. It allows the States to require in-state purchasers of interstate telephone conversations to help meet the costs of state government. Reversal would require other taxpayers, including customers of other taxed businesses with multistate aspects, to subsidize this growing and profitable form of business activity. Thus, because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[3]

STATEMENT

The Statements set forth in the briefs of appellants and appellees adequately cover the specific history of this case. However, *amici* consider many of the arguments of appellants and their *amicus curiae*, National Taxpayers Union, to be based on factual assumptions that are not valid. *Amici* thus believe that the Court would be assisted by a further explanation of the nature of the business activity at issue here, as it occurs not just in Illinois but throughout the Nation.

[3] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

1. *The structure of the long distance telephone industry.*[4] The typical telephone subscriber is a customer of a local telephone company, which in turn is part of a regional company created in the breakup of AT&T, part of a national holding company (such as GTE), or an independent company.[5] The local company handles all dialed calls within its local service area, and in some States handles all toll calls in a wider market area. In most States, the local or regional telephone company has competition for some or all of the intrastate toll calls from one point in its system to another, and, if it operates in more than one State, has competition for all of the interstate long distance business within its service area.

The long distance industry was a $60 billion industry in 1986,[6] and some of the larger players spend tens of millions of dollars in marketing and advertising aimed at securing customers throughout the Nation.[7]

AT&T is still the largest of the long distance carriers, but there are now dozens of others, such as Sprint[8] and

[4] See generally U.S. Dept. of Justice, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry* ("DOJ Study"), at 1.2-1.9.

[5] This entire field is infected with an ever-growing lexicon of acronyms, the proliferation of which makes them all less and less useful. Thus the local companies are LECs (local exchange carriers), including 22 former BOCs (Bell Operating Companies) owned by seven holding companies called RBOCs (regional Bell operating companies). They operate in 161 LATAs (Local Access Transport Areas) and are connected to one another by ICs (interexchange carriers) which have POPs (points of presence) in the LECs' LATAs. *Amici* will attempt to use descriptive English words as much as possible.

[6] DOJ Study at 3.5.

[7] DOJ Study at 3.4.

[8] Sprint was wholly owned by GTE. As a result of an arrangement between GTE and United Telecommunications, Sprint has been succeeded by U.S. Sprint, jointly owned by the two companies. See *Hold the Phone,* Forbes 52 (June 13, 1988).

MCI, which have a growing share of the long distance business, both interstate and intrastate. These carriers transmit their long distance calls through a wide variety of methods. Some of them have invested billions of dollars in their own transmission networks, including conventional land lines, microwave networks, satellite equipment and channels, and fiber optic lines. Others are basically resellers, buying transmission and connection services at wholesale from other carriers, including AT&T and the local companies, and selling them at retail to individual callers. Because the local telephone companies (with a few exceptions) are the exclusive source of connection to individual subscribers, the long distance carriers must, at each end of each long distance call, rely on the local companies to carry the call from the point at which the long distance lines connect into the local system to and from the parties to the call.

Every local telephone subscriber can select a long distance retailer to be his primary long distance carrier, *i.e.,* the carrier that automatically gets the direct-dialed long distance business from that telephone when a long distance number (other than some toll calls in some local market service areas) is dialed. A subscriber can use another long distance carrier by dialing a special code or an access number for the carrier (originally a local number and now usually an 800 number) to reach a regional or national switching center, which puts the long distance carrier's dial tone or operator on the line for completion of the call, whether intrastate or interstate.

2. *The mechanics of long distance calling.* The networks of paths and switching points that constitute a long distance system are not at all like highways or rail lines or other ordinary routes of physical movement. Instead, these networks consist of "geodesic" structures, webs of linked paths capable of switching the course of signals at each crossing or "node."[9] By way of illustration, a triangle with three nodes offers two routes to get

[9] See DOJ Study at 1.2-1.3.

from one corner to a second—one direct, and one via the third corner. A network with thirty nodes connecting its various paths offers *billions* of routes to get from any one point to any other.[10] Once a telecommunications network exists, there is no noticeable loss or delay from using any available path. Thus, any time that a direct path is full or not working at peak efficiency, any other route, no matter how indirect—and without any regard for state boundaries—can be utilized instantaneously, even by switching paths during a call. In some areas, the network is built with very few cross paths, but with most of the paths arrayed like spokes on a hub, so that calls from one point on the rim to another nearby in-state point must travel all the way into the hub—which may well be in another State—and back out on the next spoke.[11]

Microwave and satellite transmission add further variations. A signal travelling from one microwave tower to the next may go "through" a State but never touch anything in it. A satellite transmission may leave the building the caller is in on one coast and never touch the ground again until it is received at a satellite dish on the building housing the other party on the other coast. Even a call between two parties in the same State might take a similar route—going up at one end of the State, coming down at a dish in a nearby State, and then coming back into the State by wire or microwave.[12]

In short, rather than having a predictable, or "necessary," course, telephone calls literally travel every which

[10] *Id.* at 1.18, 2.26.

[11] For example, a long distance telephone call from Kittery, Maine, to Portland, Maine, travels through Portsmouth, New Hampshire. See Attachments A-1–A-9 to Exhibit filed October 4, 1982, by AT&T in *United States v. Western Electric Co.*, Civil Action No. 82-0192 (D.D.C.)

[12] Before Illinois began to allow competition for certain intrastate phone service, GTE and other non-Bell carriers used to route some of their Illinois-to-Illinois calls via out-of-state points to give them "interstate" status. See Krohe, *Rules for a Revolution: Telecommunications in Illinois,* Illinois Issues 6, 8 (Sept. 1984).

way. Ostensibly intrastate calls frequently are routed through other States and can go out into space over other States or even other countries. Interstate calls may travel an almost unlimited number of radically different routes through large numbers of States to reach their destination. The long distance segment of an intrastate call may have very little contact with that State, while an interstate call of the same straight-line distance may travel most of its course through the State. Since each call may take a different course (or multiple courses) through a large number of States, or no States, it is virtually impossible to keep track of the precise route of each call even if there were a reason to do so, for the cost of identifying and recording each such segment of each call would be prohibitive in relation to the cost of the call.

Thus, the assumption[13] that the purchaser of a long distance telephone call has his cargo of electronic impulses transported over the shortest route to its destination along a defined path using a particular mode of transmission, like a trucking or rail customer, is totally inconsistent with the technology of today's telephone industry. The purchaser of a long distance telephone call simply buys from the vendor a single end product: a conversation with a distant person. The purchaser cares not a whit which States the call goes through, whether it zig-zags through thousands of nodes or goes in a straight line, whether it goes down the spokes of a hub and back again, or up into space and back again, as long as the quality is good and the price is right.

3. *The cost of long distance calls.* Appellants also assume that there is a simple, proportional relationship between the distance separating the parties to a call and the price of the call.[14] In fact, over the period covered by this case, the price of calls throughout the Nation has

[13] See, *e.g.*, Goldberg Brief at 31, 34.

[14] *Id.* at 33-34.

varied as widely as the routing and technology for those calls. Differences in history, competition, regulation, market strategy, and cost levels for long distance providers have produced a price structure that is constantly changing, difficult to comprehend, and anything but regular. Since 1985, in many places, including the Washington, D.C., metropolitan area, the price of some intrastate toll calls has been significantly higher than the price of some interstate calls covering much longer distances. And many shorter distance interstate calls are priced higher than longer distance interstate calls.[15] Sometimes the price of a shorter intrastate call has been greater than the price of other intrastate calls of greater distance.[16]

Since much of the cost of a typical long-distance call is at the ends, and for billing and other non-transmission costs, rather than for the long distance transmission, and since some long distance calls are handled by satellite, which is not distance sensitive,[17] the distance between the parties may be a much less significant factor in the cost of a call than the form of service chosen (direct dial, credit card, collect, person-to-person); and the spread between the price of calls to destinations at drastically different distances is steadily diminishing.[18]

Whatever the total retail price for a call, the buyer pays the cost of both ends, whether the distance between the parties is short or long, and whether the other end is in the same or a different State. When a customer in Illinois purchases a conversation with a person in New York from the long distance carrier, the price includes all three components of the service—the Illinois end, the multi-state (or no-State) middle, and the New York end —just as the purchase of a Chicago-Waukegan call includes both ends and the (possibly interstate or outer space) middle of that call.[19] The person in Illinois who buys the call is purchasing the whole product from the vendor, who assembles the many pieces of multi-state activity necessary to create the product, just as the Illinois buyer of a book buys from a Chicago bookstore the Michigan pulp, which went into the Wisconsin paper, which, combined with the Ohio ink, was used in New Jersey to print the New York-edited text written by the Vermont author living in Florida.

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[15] The current telephone book shows the rate for a daytime call within Maryland of 71 miles at 54 cents for the first minute and 37 cents for additional minutes, while a call from Maryland to Virginia of 292 miles costs 51 cents and 35 cents, respectively. See 1987 C & P Telephone Prince George's County White Pages at pp. 26-27. Calls from Arlington, Virginia, to various points are priced as follows:

Stafford, Va.	30 mi.	.44 1st min.	.29 add. min.
Leonardtown, Md.	45	.48	.28
Central Ohio (419)	400	.25	.24
No. Calif. (916)	2800	.31	.27

[Va. and Md. rates per 1988 C & P Virginia White Pages at pp. 26-27; Ohio and Calif. rates per U.S. Sprint Customer Service. Mileage approximate, from Rand McNally Road Atlas, pp. 3, 99 (1984)].

[16] *E.g.*, the cost in cents for a call from Chicago to Schaumburg, Ill., in 1985 was 22 for the first minute and 14 for additional minutes. A call to Elk Grove Village, closer to Chicago, cost 30 and 19. A call to Waukegan, about twice as far from Chicago as Elk Grove was 26 and 16. See 1985 Illinois Bell Chicago Telephone Directory at p. 27.

[17] See DOJ Study at 1.3, 3.8; E. Ploman, *Space, Earth and Communication* 63 (1984) (satellite communication is "'cost distance' insensitive").

[18] Current Sprint prices for the first minute of a telephone call from Washington, D.C., include 24 cents to Baltimore (37 mi.), and to New York (229 mi.), 25 cents to Rochester, NY (296 mi.), and to Boston (414 mi.), 28 cents to St. Louis (696 mi.), 29 cents to Chicago (590 mi.), 30 cents to Miami (919 mi.) and Salt Lake City (1839 mi.), and 31 cents to Denver (1464 mi.). The Sprint surcharge for using a credit card is 55 cents. The mileage figures are airport to airport miles from the Official Airline Guide (June 15, 1988).

[19] The only exception is certain large volume users, which may have direct connections to a long distance carrier at one or both ends of the call.

But, unlike the book, each copy of which probably has the same multi-state origins, each call, even between the same parties, can take very different routes. Nevertheless, the purchaser of retail telephone services does not pay a different price for a particular call because it took a roundabout route through the network, or went 22,000 miles into space and back again, or because it went by fiber optics instead of microwave. The long distance carrier itself treats the entire point-to-point conversation as the essence of the purchase and charges the same price at retail for that point-to-point conversation regardless of how or how far it travels to get from point to point. Under present practice, neither the vendor, nor the customer, nor the many States through which a call may travel, record or care about the particular route of a single call. And, until this case, no one has suggested that they should.

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither the text of the Commerce Clause nor the interpretive rulings of this Court impose on the States any particular form of tax strategy. States may select from a variety of tax mechanisms, including excise taxes on specific types of purchases, gross receipts taxes on business activity, or income taxes. The fact that the purchases, receipts, or incomes on which such taxes are levied derive in part from activities with multi-state aspects does not render them unconstitutional. In fact, in today's commercial world, there is virtually no activity that does not have an interstate dimension, and any rule that erected serious barriers to the state taxation of such activities would present an ominous threat to the viability of the federal system.

All that the Constitution demands of such state taxes is that they operate fairly and not create discriminatory impediments to the free flow of interstate commerce. This Court listed in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and explained in *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619 (1988), the

factors to be considered in making that assessment: adequate nexus with the taxing State, apportionment among States if the tax is imposed in more than one State, no discrimination against out-of-state activities as compared with in-state activities, and some general benefit to the taxpayer from the taxes paid.

The Illinois tax on telecommunications at issue in this case more than meets those standards. The tax is imposed only on calls that are linked closely with Illinois because they are made either to or from Illinois and are charged to an Illinois customer of the retailer of such calls. In the nature of the long distance telephone business, this means that the vendor offers his retail long distance services in Illinois and has or purchases transmission facilities in the State. Where the taxpayer would be subject to a tax on the same call in another State, Illinois makes the maximum possible allowance by providing a full credit for taxes paid to any other State. Thus, Illinois goes beyond the requirement of apportionment by ceding its taxing power completely to the extent of the other tax.

The question of discrimination does not even arise because Illinois imposes the same percentage tax on intrastate and interstate calls. A prospective customer making a $2.00 call to place an order with an out-of-state factory will pay the same tax (10 cents) as he would if he placed the same priced call to an Illinois supplier. Similarly, there is no state benefit problem here. While the Court requires only a general benefit to the taxpayer, here both the taxpayer and the vendor have a presence and activity in Illinois and thus both are benefitted by the state services that the telephone tax supports.

The unanimous decision this Term in *Holmes*, issued after the filing of appellants' briefs here, should resolve any doubts as to this case. *Holmes* involved a situation where the item subject to the tax had much less nexus with the taxing State, the vendor had none, and the state benefits thus went only to the taxpayer and not the vendor.

Amici believe that the unanimity and clarity of *Holmes* should be preserved. *Holmes* has simplified a difficult area, and promotes the consistent view of this Court, essential to the health of the federal system, that the States must be given adequate flexibility to develop taxing mechanisms to support the growing burden of public services that they are called upon to provide. The broad variety of communication and information products is a rapidly growing source of business activity which should not be immunized from paying its fair share of state taxes. As this industry expands, the Court should allow the States to develop their own means of moving with the times consistent with *Complete Auto* and *Holmes.* If substantial problems arise, the Court will have ample opportunity to resolve them. Here there are no real problems that need repair. Nevertheless, appellants would have this Court—in anticipation of speculative and avoidable future problems—become a super state legislature and impose its own set of rigid rules which will hobble the States and impose costly new administrative obligations on the telecommunications industry.

In fact the remedies suggested by the appellants would worsen the situation they now face. One appellant would have this Court require use of a "unitary business/formula apportionment" technique to figure each State's taxable share of telecommunications activity. Apart from the fact that the Court has not made any one form of tax mandatory, the selection of that particular form, which is valid, but complex and hotly contested, to the exclusion of all others, hardly seems reasonable. The other appellants would have the Court require a state-by-state breakdown of each and every call, so that each State on the route can assess a tax commensurate with its particular contact with the call. Since a single call may have different types of contacts with dozens of States, may take a route different from another call between the same two points, and may even switch routes in mid-call, this impractical alternative appears counter-

productive for all concerned and emphasizes the rationality of Illinois' selection of the tax involved in this case.

Illinois does not attempt to tax all calls with an Illinois participant, as appellants apparently would allow it to do. It taxes only those calls that have both that nexus, and, in addition, a purchaser in the State. If a call to or from Illinois is charged to a subscriber elsewhere, the call is not subject to the Illinois tax. Thus, if other States adopt Illinois' system, there would be no multiple taxation, not even the permissible level of minor overlap which this Court has allowed. A call in either direction between State A and State B will be taxed in State A if it is charged to a subscriber in A and taxed in State B if it is charged to a customer in B. That is as simple and reasonable an arrangement as one can imagine in this complicated field. It is beyond *amici*'s comprehension why any taxpayer or vendor would want to change that system, except in hopes that the alternative would be so labyrinthine that it would discourage States from taxing telecommunications at all.

Neither the Constitution nor this Court is a suitable instrument for that kind of mission. *Complete Auto* and *Holmes* fully support the Illinois Supreme Court's decision, and that decision should be affirmed.

ARGUMENT

I. THE UNANIMOUS DECISION IN *D.H. HOLMES,* APPLYING *COMPLETE AUTO,* CONTROLS THIS CASE.

The lower court and the parties agree that the general principles set forth in Justice Blackmun's opinion for a unanimous Court in *Complete Auto*, 430 U.S. 274 (1977), are relevant here. In *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619 (1988), the Chief Justice wrote for a unanimous Court that "*Complete Auto* abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States. We recognized that, with certain restrictions, interstate commerce may be required to pay

its fair share of State taxes." *Id.* at 1623. In *Complete Auto*, the Court ruled that a state tax does not offend the Commerce Clause if it is applied to an activity with a "substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." 430 U.S. at 279. But in *Complete Auto* those criteria were merely identified, and not contested or applied, leaving open many questions of application and interpretation.

In most of the cases interpreting *Complete Auto* since that unanimous decision in 1977, the Court's struggles with those concepts have left it divided, frequently intensely so. *See, e.g., Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) (majority opinion joined by six Justices; one dissenting; two not participating); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (opinion of the Court joined by five Justices; one Justice ("with considerable doubt") concurring; three dissenting).[20] But this Term in *Holmes*, the Court again achieved unanimity in this field. The opinion by the Chief Justice provides clear and concise guidance for the application of *Complete Auto* in a context more problematic than this case. The conclusion in *Holmes* makes manifest that taxes like the Illinois tax at issue here fall well within the scope of valid state taxing power.

In *Holmes*, Louisiana imposed a 3% "use" tax on the taxpayer's "distribution" in Louisiana of catalogs purchased, designed, and printed in other States and mailed into Louisiana. The taxpayer, D.H. Holmes Company, owner of thirteen department stores in the State, argued that the application of the use tax violated the Commerce Clause. The state court found that the catalogs had

[20] *See also American Trucking Ass'ns, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987) (5-4 decision); *Tyler Pipe Indus., Inc. v. Washington Dept. of Revenue*, 107 S.Ct. 2810 (1987) (4 separate positions).

"left the stream of interstate commerce" when they "landed" in mailboxes in Louisiana. 108 S.Ct. at 1622. This Court, however, held that *Complete Auto* dispensed with the notion that interstate commerce itself cannot be taxed, and thus "it really makes little difference for Commerce Clause purposes whether appellant's catalogs 'came to rest' in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce." *Id.* at 1623. Thus the Court analyzed the validity of the tax under the Commerce Clause on the basis of the *Complete Auto* criteria, and in doing so articulated clearly the reasons why the Illinois tax challenged here must be found valid.

A. The Illinois Tax Is Applied To An Activity That Has A "Substantial Nexus With The Taxing State."

In *Holmes*, nexus was hotly contested because the use tax was levied as a result of distribution by mail of items whose origins were entirely out of state. Nevertheless, this Court found "'nexus' aplenty" (108 S.Ct. at 1624), not only because of the distribution of Holmes' catalogs in Louisiana, but also because the taxpayer itself had "significant economic presence in Louisiana," had "many connections with the State," and received "direct benefits" from the State in conducting its business. *Ibid.*

In this case, appellants concede nexus, and for good reason. There are at least four independent bases for finding nexus here. First, every call taxed by Illinois originates or terminates in Illinois, which means that the taxed activity itself has a substantial connection with the State. Second, the key transaction, the *sine qua non* of that activity, is the agreement of an Illinois customer to purchase the call; it is also inherently an Illinois-connected event. Third, the subscriber making the purchase and subject to the tax resides or conducts a business in Illinois and thus receives benefits from the State. Finally, the vendor certainly has, to use the Court's felicitous phrase, "many connections with the State" (108

S.Ct. at 1624).[21] Not only does each call it sells and completes there constitute a connection with the State, but the "POPs" (points of presence) that connect it to the various local calling areas in the State, its marketing efforts in the State, its ability to be accessed directly on the telephones in the State, and its involvement in the regulatory process of the State,[22] each establish a separate nexus for the vendor, even if the "nexus aplenty" of the taxpayer were not more than sufficient. In short, this case follows *a fortiori* from *Holmes*, where the activity nexus was weaker and the vendor of the catalogs had no apparent nexus at all. Here the activity, the purchase, the taxpayer, and the vendor all have solid and extensive nexus to the taxing State.

B. The Illinois Tax "Is Fairly Apportioned."

In *Holmes*, the State's tax was a fixed percentage of "the cost price" of the item used or distributed in the State.[23] There was no attempt to determine or adjust for the relative proportion of in-state and out-of-state value in the item or—with one exception—to treat the item purchased out-of-state any differently than if it had been an item purchased in-state and subject to the sales tax. That exception was the section of Louisiana law which provided that a "credit against the use tax . . . shall be granted to taxpayers who have paid a similar tax

[21] It is worth noting the source of GTE's present financial interest in the case. While the state law requires the telephone carrier to pay the tax if the subscriber does not, in this case the absence of payment by GTE's subscribers appears to be the result of an administrative deficiency on GTE's part. See Goldberg Brief at 3 n.1.

[22] Sprint's current Monthly Bill Form refers to various rules of "your state's Public Utility Commission" four times.

[23] Although the use tax speaks in terms of tangible personal property (*see Holmes*, 108 S.Ct. at 1621 n.1), which the catalogs undoubtedly were, the complementary sales tax, which covers sales of services, treats printing as a sale of services. See La. Rev. Stat. Ann. § 47:302(C); § 47:301(14)(d) (West 1988).

upon the sale or use of the same tangible personal property in another state." 108 S.Ct. at 1623-24. On this basis, the Court had "no doubt" that the apportionment test was satisfied: "The Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States." *Id.* at 1623.

The situation in the instant case is indistinguishable in this respect, and the Illinois Supreme Court was prescient in using almost identical language to make the same finding. That court found that the apportionment test of *Complete Auto* was met here because the Illinois tax on the purchase of interstate telephone calls "provides a credit against any tax due from a taxpayer who has paid two or more taxes on the same interstate telecommunication." J.S. App. in No. 87-826 ("Goldberg App.") at 13a.[24]

In finding that the Louisiana tax was fairly apportioned, the Court in *Holmes* mentioned only one other factor: that "Louisiana imposed its use tax only on the 82% of the catalogs distributed in-state; it did not attempt to tax that portion of the catalogs that went to out-of-state customers." *Id.* at 1624. Similarly, Illinois makes no attempt to apply its tax if there is either no Illinois party or no Illinois purchase. The tax applies only to a person in Illinois who purchases retail telecommunications originated or received in Illinois. Goldberg App. at 29a; Ill. Rev. Stat. ch. 120, § 2004 (1986).

Thus, while there might be other ways of meeting the fair apportionment test, the two criteria set forth in

[24] As this Court noted in *Holmes*, the Louisiana statute included a provision "instructing that 'there shall be no duplication of the tax.'" 108 S.Ct. at 1624. The Illinois law prefaces its credit provision with a similar statement of its purpose: "To prevent actual multi-state taxation of the act or privilege that is subject to taxation under this paragraph . . . ." Goldberg App. at 29a-30a; Ill. Rev. Stat. ch. 120, § 2004 (1986). *See also Tyler Pipe*, 107 S.Ct. at 2821 ("a credit for . . . taxes paid to other States would presumably cure the discrimination").

Holmes—a credit "to taxpayers who have paid a similar tax" and absence of any effort to tax activities with no in-state component—are fully satisfied here.

C. The Illinois Tax "Does Not Discriminate Against Interstate Commerce."

Holmes requires only that the tax applicable to the out-of-state purchase be the same as that on an in-state purchase. Since the Louisiana tax was "equal" to the sales tax on in-state purchases, *i.e.*, the same percentage of the value of the taxed item, the Court found that the State's "tax structure . . . does not discriminate against interstate commerce." 108 S.Ct. at 1624. There is no suggestion of any requirement, urged by appellants here, that the tax on the interstate transaction must be less, because it contained out-of-state value, or that the tax on the in-state transaction must be more because it contained more in-state value.[25]

Undoubtedly a catalog ordered, designed, printed, packed, and shipped within the State might well have higher in-state content; but the Court plainly did not view the absence of a differential in the tax formula as discrimination against interstate commerce in the constitutional sense. The Court did not consider it necessary to venture into this interstate tax quagmire, in part, one could suppose, because of the impact on the Court's caseload if each State were required, at peril of violating the Commerce Clause, to vary its tax on each transaction, activity, or item with out-of-state value so as to reconcile each of them with every other.[26]

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[25] The Court has never suggested that state sales taxes may be imposed only on the value added in the State or attributable to a transaction within the State. That type of tax is a value added tax, not a sales tax. See generally C. McLure, Jr., *State and Local Implications of a Federal Value Added Tax* 2-3 (Academy for State and Local Government, Jan. 1987). Among the States, only Michigan has a value added tax. Mich. Comp. Laws Ann. §§ 208.1-208.145 (West 1986).

[26] Presumably, this evaluation would be required as well for those "intrastate" calls that travel to out-of-state switching points or on out-of-state paths, or on supra-national paths via satellite.

Again, there can be no doubt that the Illinois tax conforms to the *Holmes* explanation of the *Complete Auto* discrimination test. The Illinois tax on the purchase of interstate calls is "equal" to that on the purchase of intrastate calls: 5% of the gross charge. Goldberg App. at 29a; Ill. Rev. Stat. ch. 120, § 2003 (1986). The rate of the tax on the gross retail purchase price of a ten-minute call with a person one hundred miles distant will be exactly the same, whether that person is in-state or out-of-state, and the absolute amount will be the same, if the retailers of those calls charge the same gross price.

If the price of an intrastate call is higher than the price of an interstate call of equal or greater reach and duration (see pp. 7-9, *supra*), then the tax will be higher on the intrastate call. Similarly, the price, and therefore the tax, on two identical calls—either interstate or intrastate—bought from two different carriers may be different if, in their competitive wisdom, they set different rates.

But none of these differences in the price-based tax goes to the issue of the constitutional validity of the tax. Although the retailer may be buying the raw components of the completed product in different places and at costs that vary from call to call and sometimes within a call, and may be obtaining a different profit margin on different calls between identical end points, the customer is buying a complete conversation for one price and paying one retail tax. The customer pays the same tax on the same price call whether that call goes between two in-state points via another state or via outer space, or between an in-state and out-of-state point over long lines and switching machinery that is all in-state.[27] *Holmes* makes clear that the Commerce Clause requires no more.

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[27] This can happen in Illinois when a call from one end of the State goes to a local exchange carrier in a multi-state metropolitan area. It can happen elsewhere if all the switching for a multi-state area is done in one State, so that the "work" for a call from that State to one of the other States is almost completely done in the originating State.

D. The Illinois Tax "Is Fairly Related To Services Provided By The State."

In *Holmes*, the catalogs at issue were the result of creative and production processes outside the taxing State until the final act of delivery by U.S. mail. Thus the Court was faced with the argument that Louisiana provided no services whatsoever in connection with the creation and distribution of the taxed goods.

Faced with a similar contention on the nexus issue, the Court relied in part on the in-state distribution process itself as a basis for finding the requisite contact. But on the "benefits" issue, the Court made clear that the *taxpayer's* receipt of general advantages or benefits from the State—including the general benefits to the public of tax-supported safety and transportation services unrelated to the specific taxed item or transaction—was sufficient. "Louisiana provides a number of services that facilitate Holmes' sale of merchandise within the State: It provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit appellant's customers, and supplies a number of other civic services from which Holmes profits." 108 S.Ct. at 1624. While the Court recognized that "many others in the State benefit from the same services," it concluded that the tax on the catalogs "is related to the advantages provided by the State which aid appellant's business." *Ibid.*

There is not the slightest hint in the *Holmes* opinion that the state services did, or needed to, relate to the particular process of creating or distributing the taxed item—*i.e.*, benefit the out-of-state catalogs. Nor is there any suggestion that meeting the benefits test depended on an analysis of the relative magnitude of the in-state to out-of-state "burden" created by the catalogs, as is urged by appellants here. On the contrary, if that had been the test, the catalogs in *Holmes* would surely have failed it.

Appellant GTE's problem proceeds from its description of the test: "fair relation to the services Illinois provides *the taxed activity*." GTE Brief at 47 (emphasis added).

Of course, the emphasized words do not appear in *Complete Auto*. In fact *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the very case that GTE cites, makes clear that GTE's approach is based on "the incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the State on account of that activity." *Id.* at 627 n.16. On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit'." *Id.* at 628.[28] Here there is no question that the taxpayer (as well as the vendor) benefits from Illinois services financed in part by the tax. As the nexus discussion above (pp. 15-16) demonstrates, since the taxpayer subscribes to telephone service in Illinois, makes an Illinois purchase of the service, and generally is in Illinois participating in the particular conversations purchased, all of the general civic benefits provided by the State and supported in part by the telecommunications excise tax benefit the taxpayer.[29] Moreover, even though, as *Holmes*

[28] The dissent in *Commonwealth Edison*, even though disagreeing with the majority on the fourth prong of *Complete Auto* because it found a "tailored" tax situation, nevertheless agreed that fair relation is not a "narrow" concept, citing the relevance of general police and fire service. 453 U.S. at 647 (Blackmun, J., dissenting). The *Commonwealth Edison* dissent said that there is a limit: that interstate commerce not be unduly burdened by taxes that intentionally single out interstate business. The examples of such burdens given by the dissent have no relevance here, nor is there a claim of a tailored tax.

[29] *Commonwealth Edison* does state that the *measure* of the tax must be reasonably related to the extent of the contact, *i.e.*, "the activities or presence of the taxpayer in the State," but it explains that a tax measured as a percentage of the value of the taxed item provides the assurance that the tax is in "proper proportion" to the activities. 453 U.S. at 626. Since the Illinois tax is on Illinois purchases of telephone conversations with Illinois parties, and is measured as a percentage of those purchases, the distribution of tax burden "is assessed in proportion to a taxpayer's activities . . . in a State," so that "the taxpayer is shouldering its fair share of supporting" the State's benefits. *Id.* at 627.

shows, no benefit to the vendor is required—at least not where the taxpayer-purchaser receives benefits, in this case the vendor is very much present and operating in Illinois, both in general and in connection with the particular transaction being taxed, and therefore also benefits from the services and protection offered by the State.

Thus, on the fair relation test, as with the nexus test, this case presents an *a fortiori* situation compared to *Holmes*. Appellants' arguments (made before the *Holmes* decision) offer no possible rationale for abandoning the standards and logic of *Holmes* so soon after its unanimous issuance.

II. THERE IS NO REASON FOR THE COURT TO ACCEPT APPELLANTS' INVITATION TO RETREAT FROM THE CLARITY OF *HOLMES* INTO THE QUAGMIRE THAT PRECEDED IT.

Appellants advocate a course that would have the Court regress to the complexity, circularity, and confusion which members of the Court have seen in prior decisions on taxation of multi-state items and transactions—the "quagmire." *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Apart from the fact that the Court unanimously, clearly, and decisively took the path out of the quagmire in *Holmes*, and should not reverse course so soon for any reason, the course charted by appellants makes no sense.

A. The Court Should Not Revert To The Concept That Interstate Commerce Is Immune From State Taxation.

Appellants spend a great deal of effort revisiting the issue of the supposed dichotomy between a tax on the "privilege" of engaging in an interstate activity, and the purchase by an Illinois customer of a multi-state item. *See Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 (1951), overruled, *Complete Auto*, 430 U.S. at 289. The practical effect of their prescription for this case would

be to return to the semantic "formalism" of *Spector* and its principle "that a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce." *Complete Auto*, 430 U.S. at 278.[30]

The discussion in Part I above demonstrates why, if such semantic categorization were relevant, the tax here would fall on the "purchase" side. The distinction is substantially academic, however, since this Court has made clear that it will not let "the use of magic words or labels" "disable an otherwise constitutional levy." *Complete Auto*, 430 U.S. at 284, quoting *Railway Express Agency v. Virginia*, 355 U.S. 434, 441 (1959).

If the transactions at issue here, with quadruple layers of local nexus—the taxpayer, the activity, the transaction, and the vendor all have substantial local contacts—cannot be subjected to a percentage excise tax, very few such taxes involving interstate activity would pass muster, and the tax immunity principle of *Spector* would be revived.

Such a backslide would have to ignore the fact that in recent years "the Court has consistently indicated that 'interstate commerce may be made to pay its way,' and has moved to a standard of permissibility of state taxation based on its actual effect rather than its legal terminology." *Complete Auto*, 430 U.S. at 281. That progress culminated in the overruling of *Spector* in *Complete Auto* because "there was no real economic difference" between the taxes being sustained and those being invalidated under the *Spector* rule. *Id.* at 284. Appellants suggest no reason why this Court should revert to a rule "attaching constitutional significance to a semantic difference." *Id.* at 285. On the other hand, the States' vital interest in preserving and enhancing their ability to finance their

[30] Indeed, appellants would have this Court go back 62 years before *Spector* to *Western Union Telegraph Co. v. Alabama State Bd. of Assessment*, 132 U.S. 472 (1889), to invalidate any tax which "was laid 'upon receipts properly appurtenant to interstate commerce,' and so constituted a tax on interstate activity." GTE Brief at 23, quoting *Western Union*, 132 U.S. at 476.

expanding role in the federal system and in not being excluded from access to the many new forms of information activities as a source of tax revenues, speaks loudly for confirming this Court's unanimous movement away from *Spector* and towards "permissibility" (*id.* at 281) of state taxation of transactions involving multi-state activities.

B. The Court Should Reject Appellants' Efforts To Transform An Uncomplicated Excise Tax On Activity With Ample State Nexus Into A Mandatory "Unitary Business/Formula Apportionment" Form Of Interstate Taxation.

Appellants' briefs disclose different views on what appellants really wish this Court to do here. GTE apparently would like this Court to rewrite all state taxes relating to interstate activity to conform to the "unitary business/formula apportionment" income tax model, a controversial and frequently litigated form of state taxation. Not only in its discussions of the *Complete Auto* "fairly apportioned" test, but in its discussions of the other three tests as well, GTE says that the result that it seeks is that "[a]ny state tax on interstate activity . . . must be limited to that portion of the interstate activity which occurs within the taxing State." GTE Brief at 11. While it cites *Complete Auto* for this proposition, no such language appears on the page cited or anywhere else in that decision. Rather, GTE's brief discloses that GTE reads into *Complete Auto's* use of the word "apportion" the entire burden of the "unitary business/formula apportionment" analysis set forth in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). See GTE Brief at 12, 25-26.

This Court, however, has consistently declined to mandate a particular form of taxing for the States. *See, e.g., Container Corp.*, 463 U.S. at 164; *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1978); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462

(1959); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937).

Moreover, the particular model selected by GTE is totally inappropriate to the Illinois tax. As has been demonstrated above, the taxpayers, activities, transactions, and vendors subject to the Illinois tax all have "nexus aplenty" to the State imposing the excise tax. But the formula apportionment model of *Container Corp.* relates to state taxes on corporate net income from all transactions and activities involved in a corporation's "unitary" business, regardless of location or discernible nexus with the taxing State. It is the "formula" that provides an arithmetical estimate of the portion of this total income that can fairly be taxed by an individual State, *i.e.*, a "macro" estimate of nexus instead of a "micro" finding of nexus for each activity.

States choose the unitary form of tax because, in the context of a tax on a corporate income, ascertaining the State's nexus for each element of profit through "formal geographical or transactional accounting . . . is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." *Container Corp.*, 463 U.S. at 164-65. The State "instead calculates the local tax base by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction." *Id.* at 165.

While the unitary income tax method is perfectly appropriate, valid, and constitutional,[31] it is not mandatory,

[31] While not necessary to the decision here, since questions relating to the unitary tax are not involved in this case, it is in-

and cannot, under this Court's precedents, be made mandatory. The Illinois tax at issue here is neither a tax on net income nor a unitary tax, and thus the formula apportionment rules have no relevance.[32] Here, the es-

teresting to note that, as discussed in *Container Corp.*, the level of sales volume in a State is one of the valid apportionment formula factors (463 U.S. at 183-84), and the Court (divided as is usual on such issues) has allowed sales to be the single factor in an apportionment formula. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). The disagreement in the *Moorman* case related to whether the use of sales as the sole determinant for unitary taxation of an out-of-state business' entire profits "inevitably handicaps out-of-state businesses competing for sales in" the taxing State. *Id.* at 289 (Powell, J., dissenting). Justice Powell's dissent concluded that Iowa's formula "necessarily discriminates against out-of-state manufacturers" because among the other States with similar taxes there was "virtually universal use" of a three-factor formula, and the asymmetry automatically produced a disadvantage. *Id.* at 292. Among other reasons for upholding the tax, the majority saw no such inevitability because, even though Iowa's share of the sales was only 20%, the share of the profits generated by the Iowa sales might have been much greater, and, in fact, greater than the amount of profit actually taxed by Iowa. *Id.* at 276. Since there is no universal or even widespread conflicting formula here and no handicap whatsoever to out-of-state business, that dispute has no application to this case.

[32] The discussion in *Container Corp.* of the "internal" and "external" consistency requirements, on which GTE dwells, was in the context of taxation of a "unitary business' income." 463 U.S. at 169. Since then, the Court has extended the internal consistency requirement to gross receipts taxes (*Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984), *Tyler Pipe Indus., Inc. v. Washington Dept. of Revenue*, 107 S.Ct. 2810, 2819-21, 2823 (1987)), and to flat taxes (*American Trucking Ass'ns, Inc. v. Scheiner*, 107 S.Ct. 2829, 2840 (1987)). The Illinois tax is perfectly internally consistent; if every State imposed a tax only on calls charged to customers in that State, no call would be taxed more than once. The Court has not expressly considered the external consistency requirement outside the *Container Corp.* context. In the context of sales taxes, the *Complete Auto* tests measuring nexus and fair relation ask essentially the same questions, and those tests are also satisfied in this case (see Parts I.A. and I.D., *supra*). In fact, because the entire concept of formula apportionment is a substitute for transaction-

sential fairness of the application of the State's taxing power is established by the nexus required for each separate taxed transaction. To repeat the conceded but vital facts, each call is to or from an Illinois telephone, purchased by an Illinois subscriber, and sold by a vendor offering its services to subscribers in Illinois and operating or purchasing transmission facilities in Illinois. Thus there is no need for a statistical proxy for the actual requirement of nexus in the Illinois statute.

C. This Court Should Not Impose A Mandatory "Slicing Of Shadows"[33] Requirement On State Taxation Of Telecommunications: Such A Requirement Is Not Constitutionally Required, Is Unworkable, And Is Inappropriate To The Activity Taxed.

The Goldberg variation on GTE's theme, probably recognizing its irrelevance, never mentions the *Container Corp.* discussion of formula apportionment. Instead, the Goldberg appellants would have this Court impose a requirement that "retailers bill consumers for the particular tax each participating State chooses to levy on its proportionate share of each communication." Goldberg Brief at 11. In other words, they would not allow a tax relating to interstate communications unless the electron stream were traced on its trip from point to point and some assessment made of the contribution by

by-transaction nexus, there is no reason to superimpose the external consistency test on the requirements of *Complete Auto*. But, in any event, a sales tax measured by the selling price has external consistency because it reflects the level of the taxpayer's economic activity and is not out of all proportion to services provided by the State. *Cf. Tyler Pipe*, 107 S.Ct. at 2822 ("selling tax measured by gross proceeds of sales is 'apportioned exactly to the activities taxed'") (quoting *Standard Pressed Steel Co. v. Washington Rev. Dept.*, 419 U.S. 560, 564 (1975)).

[33] *Container Corp.*, 463 U.S. at 192 ("Allocating income among various taxing jurisdictions bears some resemblance . . . to slicing a shadow").

each jurisdiction traversed in that trip. Other than citing different types of state taxes which avoid the issue (*id.* at 29)[34] they do not suggest how this task is to be accomplished, and as has been pointed out above (pp. 5-10), it would be a task of monumental, if not impossible, proportions. First, if this Court were to hold that such a tax was the only constitutional tax on interstate calls, each taxing State would have to place a tax on every call going out of, into, or "through" its territory to generate full revenue from this source. There would presumably have to be a menu of rates depending on the quantum and type of activity in the State: one rate for origination, one for wire transmission, another for microwave transmission, another for satellite sending and receiving, a different one for fiber optic cable, allocations for marketing and billing activities, operator assistance, and so on. Each of these rates would then have to be applied to the millions of calls travelling perhaps millions of routes every day.

Since even two "identical" calls may travel radically different routes through dozens of different States, using a variety of different facilities with different costs, each call would need its own multi-state tax bill. And since the routing can change in the middle of a single call as well, some calls might have more than one tax calculation. While GTE claims that it can bill for two taxes on one call (a claim placed in doubt by its inability in this case to succeed in billing for even one tax (see n.21, *supra*)), it does not claim that it can bill for dozens of different taxes on each call, nor is there any evidence

[34] The Goldberg Brief asks (at 29) that "States recognize that *some* apportionment efforts must be made." Of course, Illinois *de facto* does so: it does not levy its tax on many calls with an Illinois nexus, such as calls into the State that are charged to a customer in another State. Thus, if the entire universe of calls to and from Illinois were aggregated, and assuming that half (by value) are charged to Illinois customers and half are not, then the levy is, overall, on 50% of the value of all such calls.

that it or any other interstate carrier would want to do so. Nor is the customer likely to want to receive a bill with dozens of state taxes itemized on each call, with no way to comprehend their source or assess their validity.

In fact, taxpayers are likely to wonder what their would-be class representatives have gained for them in the process. In all likelihood the total cost to the taxpayer would be at least as great as the single state tax at issue in this case, since, if the system were practicable, most States would want to join in; and every segment of every call would be taxed at full value. Moreover, the tremendous cost of all the required bookkeeping and billing would also be passed on to the customer (and by increasing the costs of the calls would also increase the tax).

Before reaching the question whether such a nightmare is constitutionally required, one may ask, where is the benefit to taxpayer or vendor? Right now the Illinois customer who buys a long distance call to a cousin in New York by dialing direct or by accepting the charges on a collect call, or by using a credit card, pays one tax to Illinois of 5% of the cost of the call. If New York has the same type of tax, the cousin will pay it on every call made to Illinois and charged to his New York number. Appellants suggest no way that either one of them is better off by paying, say, 2% to his own State, 2% to the distant State, and 1% divided up among five or ten other States, especially if the calls cost more as a result, and the bills need a page for each call.[35]

[35] It should be noted that under the Goldberg appellants' theory, a similar system might have to be imposed for many long distance calls between points in the same State that are routed via out-of-state switching centers or go via satellite, perhaps through out-of-state ground stations. Thus a call from one point in Maine to another might have to be billed for both Maine and New Hampshire taxes. See n.11, *supra*.

In fact, what the Goldberg appellants are suggesting is not only unworkable, it adds nothing to the fairness or equity of the situation for any of the parties to long distance calls. While increased fairness is not a sufficient condition for invoking the Commerce Clause to invalidate a state tax, it certainly is a necessary condition: the whole thrust of the *Complete Auto* tests is to improve the fairness of the tax system to those who bear its burdens. Appellants cannot meet that threshold barrier to their plea to this Court.

CONCLUSION

For the reasons stated, the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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